SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 595

VITO GRIMALDI,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Statement

Petitioner seeks a writ of certiorari in order to review an order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, dated June 15, 1970, which in turn affirmed an order of the Supreme Court of Kings County, Criminal Term, Part I, dated April 30, 1970, and entered April 30, 1970, which found the defendant to be guilty of criminal contempt under Section 750 of the New York Judiciary Law. The Court of Appeals of the State of New York denied leave to appeal on July 6, 1970. The said Court also denied a stay of proceedings pending an application for certiorari to this Court.

Jurisdiction

The jurisdiction of this Court is sought to be invoked under 28 U.S.C. Section 1257 (3). Petitioner contends he was denied his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

Defendant argues that his rights under the United States Constitution relating to his privilege against self-incrimination, to the right to the assistance of counsel and to due process of law were violated.

Statutes

The statute involved is Section 750 of The New York Judiciary Law which provides:

> Power of Courts to Punish for Criminal Contempts
>
> "A. A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others:
>
> 1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.
>
> 2. Breach of the peace, noise, or other disturbance, directly tending to interrupt its proceedings.
>
> 3. Wilful disobedience to its lawful mandate.
>
> 4. Resistance wilfully offered to its lawful mandate.
>
> 5. Contumacious and unlawful refusal to be sworn as a witness; or, after being sworn, to answer any legal and proper interrogatory.

6. Publication of a false, or grossly inaccurate report of its proceedings. But a court cannot punish as a contempt, the publication of a true, full, and fair report of a trial, argument, decision, or other proceeding therein.

7. Wilful failure to obey any mandate, process or notice issued pursuant to articles sixteen, seventeen, eighteen, eighteen-a or eighteen-b of the Judiciary Law, or to rules adopted pursuant thereto, or to any other statute relating thereto, or refusal to be sworn as provided therein, or subjection of an employee to discharge or penalty on account of his absence from employment by reason of jury service in violation of this chapter. Applications to punish the accused for a contempt specified in this subdivision may be made by notice of motion or by order to show cause, and shall be made returnable at the term of the Supreme Court at which contested motions are heard, or of the county court if the Supreme Court is not in session."

Statement of Facts

The petitioner Vito Grimaldi appeared before the Kings County Grand Jury pursuant to a subpoena on January 8, 1970, and was advised by the Assistant District Attorney of his right to refuse to answer. The petitioner asserted his constitutional privilege and was thereupon excused for a short period of time during which the Grand Jury voted to confer immunity upon him.

He was then immediately brought back to the Grand Jury room and advised that the Grand Jury had voted to confer immunity upon him. The matter was then adjourned to January 22, 1970, to allow the petitioner to consult with counsel in the interim. Thereafter, on January 22, 1970, the

petitioner returned to the Grand Jury room. The petitioner then stated that upon the advice of his counsel he would, "Hold to the previous statement made to the Grand Jury", referring to the prior assertion of his constitutional privilege against self-incrimination. The petitioner was informed that he had been granted immunity. The petitioner declined to answer any further questions upon the grounds previously stated and a motion was thereafter made by the District Attorney to punish him for contempt under the Judiciary Law by reason of said refusal to answer.

The matter came on for oral argument before Mr. Justice Helfand sitting at Criminal Term, Part I of the Supreme Court, Kings County. Upon said oral argument, counsel for the defendant pointed out to the Court that the District Attorney had not advised the petitioner that he could be subject to prosecution for perjury based upon any answers he might make if same were alleged to be false. The Court overruled that argument and Judge Helfand ruled after reviewing the minutes of January 8, 1970, that the immunity granted was granted in a proper manner and was not defective. The Court held the petitioner in contempt and imposed a thirty day jail sentence and a fine of $250.00 on April 30, 1970.

The order of Justice Helfand was affirmed by the Appellate Division, Second Judicial Department on June 15, 1970, without opinion. The Court of Appeals of the State of New York denied leave to appeal to that Court on July 6, 1970. The said Court also denied a stay of proceedings pending an application for certiorari to this Court. The petitioner was indicted on June 11, 1970, for criminal contempt under section 215.50 subdivision 4 of the Penal Law of the State of New York for refusing to answer questions on January 22, 1970.

ARGUMENT

POINT I

It was not a deprivation of petitioner's constitutional right to the assistance of counsel to refuse petitioner's request to have his counsel physically present with him in the Grand Jury room during his interrogation by the Grand Jury.

The law always has been that a witness before a Grand Jury or other similar investigative body, does not have the right to have an attorney actually in the room, *Anonymous* v. *Baker*, 360 U.S. 287, 292 (1959); *Matter of Groban*, 352 U.S. 330, 333 (1957); *United States* v. *Scully*, 225 F. 2d 113, 115-116 (2nd Cir. 1955) cert. den. 350 U.S. 897; *Matter of Black*, 47 F. 2d 542, 543 (2nd Cir. 1931); *Battaglia* v. *United States*, 349 F. 2d 556, 560 (9th Cir. 1965); *People* v. *Ianniello*, 21 N Y 2d 418, 423, although the right to consult with his attorney who may be outside the chamber is really not in serious dispute. *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Escobedo* v. *Illinois*, 378 U.S. 478, 486 (1964); *United States* v. *Leighton*, 265 F. Supp. 27, 38 (S.D.N.Y. 1967); *United States* v. *Kane*, 243 F. Supp. 746 (S.D.N.Y. 1965); *United States* v. *Grunewald*, 164 F. Supp. 640 (S.D.N.Y. 1958); *People* v. *Ianniello*, 21 N Y 2d 418, 423; *People* v. *DeFeo*, 284 App. Div. 622, 627, rev'd on other grounds 308 N.Y. 595 (1954).

Even Mr. Justice Black who dissented in *In re Groban*, *supra*, in an opinion joined in by Chief Justice Warren and Justices Douglas and Brennan, indicated that he would have joined the majority had the case involved the traditional 12 to 23 member Grand Jury, where there was less

danger of abuse than in the situation actually before the Court, one of a single inquisitor.

Mr. Justice Black said that the need for counsel in the room was not as great where grand jurors were concerned:

> "They bring into the grand jury room the experience, knowledge and viewpoint of all sections of the community. They have no axes to grind and are not charged personally with the administration of the law. No one of them is a prosecuting attorney or law-enforcement officer ferreting out crime. It would be very difficult for officers of the state seriously to abuse or deceive a witness in the presence of the grand jury. Similarly the presence of the jurors offers a substantial safeguard against the officer's misrepresentation, unintentional or otherwise, of the witness' statements and conduct before the grand jury. The witness can call on the grand jurors if need be for their normally unbiased testimony as to what occurred before them."

In re Groban, *supra* at 347.

It would seem that the wisdom of these rules is still valid because if counsel were permitted in the Grand Jury room itself, constant objections to questions on the ground of relevancy, form or other privilege and constant requests for rulings from the Court sitting would unduly lengthen the Grand Jury's proceedings. There could be a serious roadblock to legitimate inquiry implanted by stalling or delaying tactics and since a Grand Jury never ultimately determines innocence or guilt and the sufficiency of its indictments are usually open to judicial scrutiny anyway, no harm is inherent in adhering to the prevailing rules.

The secrecy of the Grand Jury's proceedings could be seriously impaired because oftentimes the same attorney

represents more than one witness during a particular investigation. The proceedings would essentially be changed in character from proceedings basically investigatory in nature to an adversary situation. This would pervert the historical purpose of the Grand Jury as a finder of fact and turn its proceedings into a pre-trial hearing. That sentiment was expressed in *Stallings* v. *State*, 154 Conn. 272 (1966), where it was thought that allowing counsel into the room would turn the Grand Jury's proceedings into nothing more than a preliminary trial and the dangers were forcefully and clearly noted by Chief Judge Fee in *United States* v. *Smythe*, 104 F. Supp. 283, 290-291 (N.D. Cal. 1952) and by District Judge Kirkpatrick in *In re Grand Jury Proceedings*, 4 F. Supp. 283, 284 (E.D. Pa. 1933).

Petitioner argues that the rationale of recent decisions of this Court in *Hamilton* v. *Alabama*, 368 U.S. 52 (1961); *White* v. *Maryland*, 384 U.S. 436 (1966); *Miranda* v. *Arizona*, *supra*; *United States* v. *Wade*, 388 U.S. 218 (1967) and *Coleman* v. *Alabama*, U.S. , 38 U.S.L.W. 4534 (Decided June 22, 1970) require the extension of the right to counsel to the Grand Jury Room.

Analysis of those authorities reveals that their holdings do not affect the long standing practice of excluding the attorney from the room itself. All of the Courts that have considered the problem have concluded that because the Grand Jury does not involve a situation where oppressive custodial interrogation in a police dominated atmosphere is present, the right to counsel should not be further extended to that situation. *United States* v. *DiMichele*, 375 F. 2d 959 (3rd Cir. 1967); *United States* v. *Goldenberg*, 276 F. Supp. 898, 900 (S.D.N.Y. 1967); *United States* v. *Wolf-*

This Court has held that even if error of constitutional magnitude is present, if no harm results, the error can be disregarded. *Chapman* v. *California*, 386 U.S. 18 (1967). In a recent case, *Coleman* v. *Alabama*, U.S. , 38 U.S.L.W. 4535 (decided June 22, 1970), where the petitioner had been deprived of his right to counsel at a preliminary hearing, this Court decided that although it was a critical stage of the proceedings, still, a remand was appropriate to determine if there had been any prejudice. The law of Alabama prevented the use of anything said at the hearing without counsel and if no harm was apparent, the judgment would not have to be disturbed. *Chapman* was reaffirmed.

POINT II

The petitioner was fully and fairly informed as to the scope of the immunity granted to him.

Section 619-c of the New York State Code of Criminal Procedure provides for the granting of immunity as follows:

> " . . . 2. 'Immunity' as used in this section means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding, but he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering or failing to answer, or in producing or failing to produce evidence, in accordance with the order, and any such answer given or

evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt."

After examining the statute one can see that it grants "transactional immunity." *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892); *Matter of Gold* v. *Menna*, 25 N Y 2d 475 (1969).

The petitioner on January 8, 1970, appeared before the Grand Jury and the petitioner was explained what immunity means and what immunity entails. On page 22 of the Grand Jury minutes of January 8, 1970 (appendix G of petitioner's brief), the petitioner was told by the Assistant District Attorney "if you admit to a crime, and your answer was *honest* and responsive to the question, the District Attorney or other law enforcement agencies cannot use that testimony nor any leads from it at all; never prosecuting you for admitting that crime."

The word honest means creditable according to Funk & Wagnall's New Desk Standard Dictionary page 380 (1953) and creditable means that one can be believed. Any reasonable man upon hearing the Assistant District Attorney's statement would know that he must tell the truth to avoid possible future legal action such as being charged with perjury.

POINT III

It was not a violation of the petitioner's rights under the Fifth Amendment to indict him for criminal contempt before he had exhausted all his appeals from the judgment of summary contempt.

The petitioner was afforded due process and all his rights were safeguarded by the District Attorney and his own legal counsel.

The petitioner was adjudicated in contempt by Judge Helfand on April 30, 1970. The petitioner did not notify Judge Helfand nor the District Attorney that he wished to testify before the Grand Jury to purge himself of the contempt adjudication of April 30, 1970. The petitioner had time from April 30, 1970, to June 10, 1970, to request an appearance before the Court in order to purge the contempt adjudication under Section 750 of the Judiciary Law of the State of New York. Since the petitioner did not make an attempt to try and purge himself of the summary contempt before Judge Helfand this is not a justiceable issue to be raised by the petitioner, because the petitioner did not suffer any legal injury. The petitioner had adequate time, before being indicted for criminal contempt under section 215.50 of the Penal Law of the State of New York, to purge himself for disobeying the lawful mandate of the Court. This was not the intention of the petitioner. Even if the petitioner wished to purge himself of the contempt he committed before Judge Helfand and he wished to obey the mandate of the Court, the petitioner's request to purge need not be accepted by the trial judge. The law in New York is stated in *Typothete of New York* v. *Typographical Union No. 6*, 138 A.D. 293, 295

> "This application, therefore, is in effect one to be allowed to purge themselves of their contempt by respondents, is addressed to the discretion of the Court which alone had power to punish for the contempt and to allow its being purged, and whose discretion and authority were in nowise destroyed or abridged or abridged by the affirmance upon appeal of its own determination. Having been satisfied that it was proper that the full enforcement of its own mandate should be stayed, and no valid reason appearing why its discretion should not be exercised to that end, the Court was within its rights in so ordering."

Even if the petitioner made a request to purge, the trial judge need not accept this request. Here the petitioner had at least two months before being indicted to make a request which he had not done. The Court should not try and surmise what might have resulted if the petitioner requested to purge himself. This issue has not arisen and the Court should not consider hypothetical cases which may or may not result in legal injury. Judge Helfand does not have to accept the request to purge and the petitioner would then have to serve his sentence.

CONCLUSION

The petition for the writ of certiorari should be denied.

Dated: Brooklyn, New York
October 23, 1970

Respectfully submitted,

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